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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 707

ALASKA AGGREGATE CORPORATION,
a corporation,

Petitioner,

v.

GEORGE BEELER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GRAY, FREDRICKSON & HEATH,
FLOYD A. FREDRICKSON,
1005 Equitable Building,
Portland 4, Oregon,
Counsel for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-64

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Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 24, 1964.

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the District of Oregon is reported at 224 F. Supp. 814 and appears at pages 13-16 of Volume I, Transcript of

Record. The opinion of the Court of Appeals is reported at 336 F.2d 108 and is printed in the Appendix hereto, infra, pp. 9-.[illegible].

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1964 (Tr. Vol. II, p. 42) (Appendix p. 13). A timely petition for rehearing was filed on September 23, 1964, and was denied September 28, 1964 (Tr. Vol. II, p. 43). This petition for a writ of certiorari is filed less than 90 days after denial of the rehearing petition.

The jurisdiction of this Court is invoked under 28 U.S.C. #1254 (1).

QUESTIONS PRESENTED

1. Can the Court of Appeals substitute its own finding on proximate cause for that of the trial judge who applied the proper legal principles in making his finding?

2. Does a perfectly sound appliance become unseaworthy if it is not used with care at the moment of an accident?

STATEMENT OF THE CASE

Respondent George Beeler was a longshoreman employed on August 27, 1961, aboard a barge known as Barge 204, which was being loaded at Portland, Oregon, on navigable waters of the United States. Petitioner was the bareboat charterer of the barge. Respondent and

the other longshoremen involved were employees of Portland Stevedoring Company, an independent stevedoring company.

The longshoremen were engaged in loading trailer houses on top of half-houses previously stowed on the deck of the barge. This necessitated their working above the deck of the barge. Just prior to the accident, libelant and his fellow longshoremen wanted to return to the deck of the barge and the walking boss, another employee of Portland Stevedoring Company, obtained an ordinary straight wooden ladder and propped it up so that the men could descend. The walking boss stood on the deck in front of the ladder to grab it in the event the ladder slipped when in use. When Brown, one of respondent's fellow longshoremen, reached the third or fourth rung from the bottom of the ladder, respondent mounted the ladder and started to descend. As Brown reached the deck, the walking boss, believing that Brown would stand by or would hold the ladder, walked away. Brown failed to do this, the base of the ladder slipped, and respondent fell to the deck, sustaining injury.

Respondent sued the petitioner alleging the barge was unseaworthy because the ladder was not secured (Tr. Vol. I, p. 4). The District Court had original jurisdiction in admiralty pursuant to Title 28, U.S.C. § 1331 (1). The District Court found that where a ladder is to be used for a short period of time, it is the custom and practice for longshoremen to have one of their group hold the ladder rather than lash it to the deck or to another portion of the ship or cargo and the ladder was

not defective (Tr. Vol. I, p. 18). It further found the proximate cause of the injury was the negligent acts of respondent's fellow employees in the use of a seaworthy appliance (Tr. Vol. I, p. 19). On the basis of these findings, the District Court entered its decree dismissing the libel. The Court of Appeals, which had jurisdiction pursuant to Title 28, U.S.C. § 1291, reversed and remanded to determine damages. The Court of Appeals stated that the trial court fully understood the legal principles applicable but that in its opinion the injury was not sustained by the negligent use of a seaworthy appliance but by an unseaworthy appliance (Appendix pp. 11, 12).

REASONS FOR GRANTING THE WRIT

1. Decision in Conflict with Applicable Decisions of this Court.

The decision of the Court of Appeals is in conflict with this Court's decision in *McAllister* v. *U. S.*, 348 U.S. 19, and the resulting McAllister Rule. *McAllister* v. *U. S.*, supra, laid down the following rule:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous." 348 U.S. 19, 20.

The trial court, in the instant case, acting as the finder of fact in an admiralty case made a finding as follows:

"The proximate cause of the injury was the negligent acts of libelant's two fellow employees in the use

of a seaworthy appliance."[1] The trial court made its finding after taking into consideration the distinction between those cases in which the negligent act had terminated and the appliance left in an unsafe condition and those in which the negligent use by longshoremen of seaworthy appliances causes an injury.[2] The Court of Appeals admits the trial court fully understand the legal principles to be applied.[3] In the face of this finding and the evidence that the trial judge understood the legal principles to be applied, the Court of Appeals finds that the injury was caused by an unseaworthy ladder.

No mention of the McAllister Rule is made by the Court of Appeals. The Court of Appeals proceeded as in a trial de novo and simply reached a different result on the proximate cause question than the finder of fact. This is not permitted by McAllister.

In McAllister, this court held that a finding of fact by the trial judge that the illness suffered by the plaintiff was proximately caused by the negligence of the shipowner was to be affirmed unless clearly erroneous. Surely, the finding by the trial judge here that the accident was proximately caused by the negligence of the stevedore's employees rather than the condition of the ladder is entitled to as much weight.

If the case had been tried to a judge and jury, and the jury had rendered a verdict for the petitioner on

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[1] Transcript of Record Vol. I, p. 19.

[2] Transcript of Record Vol. I, pp. 14-16.

[3] Appendix p. 11.

the issue of proximate cause on proper instructions, the Court of Appeals would have no alternative other than to affirm the judgment entered on the verdict. The McAllister rule lays down the same test for findings of a trial judge sitting in admiralty. If the trial judge shows that he applied the proper law in arriving at his factual conclusions, he proceeded "on proper instructions" and his findings are entitled to as much weight as a jury finding. *Castro* v. *Moore-McCormack Lines, Inc.*, 325 F.2d 72, 74. A recent case affirming this principle as it applies to findings of negligence and seaworthiness is *Morales* v. *City of Galveston*, 370 U.S. 165. Also, in *Crumady* v. *Joachim Hendrick Fisser*, 358 U.S. 423, a court of appeals decided the setting of a circuit breaker on a winch was not the legal cause of an accident although the trial court had so found. (C.A. 3) 249 F.2d at 820-821. This Court reversed, pointing out the findings of fact of the trial judge were not to be set aside unless clearly erroneous.

In this case, there is internal evidence from the opinion of the trial judge that he was not misapplying the law and his finding on proximate cause was therefore not to be reversed unless clearly erroneous.[4]

2. *Important Question of Federal Law Not Decided*

This Court has not determined, as yet, what is perhaps the ultimate issue in the field of seaworthiness. This Court has not supported a finding of unseaworthiness which did not involve some structural or functional unfitness of vessel or gear for its intended use. The

[4] *Castro* v. *Moore-McCormack Lines, Inc.*, 325 F.2d 72, 76.

most recent expression regarding the limits of the doctrine of seaworthiness is found in *Gutierrez* v. *Waterman SS Corp.*, 373 U.S. 206. This Court in deciding that the warranty of unseaworthiness encompasses defective cargo containers reviewed its earlier decisions and stated:

> "These cases all reveal a proper application of the seaworthiness doctrine, which is in essense that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." 373 U.S. 206, 213.

The instant case raises the question whether the very negligent acts of fellow longshoremen which caused injury make the ship unseaworthy. Here, petitioner had no employees aboard the barge.[5] The loading was being performed solely by respondent and his fellow employees who were employees of a stevedoring company. The ladder which was obtained so that respondent could descend was furnished by the stevedoring company and was in no way defective.[6] It was to be used temporarily for the men to descend so they could move to another position. It was customarily held by a longshoreman rather than lashed in position when the other longshoremen were descending. The stevedore foreman did stand at the bottom of the ladder with his feet in position to catch the ladder if it slipped.[7] He maintained this posi-

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[5] Transcript of Record, Vol. II, p. 6.

[6] Transcript of Record, Vol. II, p. 6.

[7] Transcript of Record, Vol. II, p. 31.

tion and the ladder was safe until the very moment of the accident when he turned away thinking the next man would hold the ladder.[8] No doubt it was negligent not to step forward to hold or watch the ladder at the moment of the accident as the Court of Appeals states, but this was simply operating negligence of the stevedore and not unseaworthiness. As a momentary incident in the continuous operation by the stevedore, its employees failed to hold or watch the ladder. To say that this failure to hold or watch the ladder at the moment of injury was an antecedent condition making the ladder unseaworthy is simply imposing liability by semantics. If a shipowner is to be liable because of negligence of the stevedore, this Court should make the extension of liability after full consideration. We do not think this Court intends to make such an extension but this is what has been done as a result of this case.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted.

GRAY, FREDRICKSON & HEATH
FLOYD A. FREDRICKSON
1005 Equitable Building
Portland 4, Oregon
Counsel for Petitioner

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[8] Transcript of Record, Vol. II, pp. 31-33.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE BEELER,	)	
Appellant,	)	
vs.	)	
ALASKA AGGREGATE CORPORATION, a corporation,	)	No. 19,188
Appellee,	)	
FOSS LAUNCH AND TUG COMPANY, a corporation,	)	
Respondent.	)	

[Aug. 24, 1964]

Appeal from the United States District Court for the District of Oregon

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Before: MADDEN, Judge of the Court of Claims, and HAMLEY and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

George Beeler, a longshoreman, injured while working on Foss Barge 204, filed a libel in personam for personal injuries against Foss Launch and Tug Company and Alaska Aggregate Corporation, alleging that the barge had been unseaworthy. The tug company is the owner of Foss Barge 204, and Alaska Aggregate Corporation was the bareboat charterer of that barge. After trial, the district court entered a decree dismissing the libel. Beeler appeals from that part of the decree which dis-

missed the libel against Alaska Aggregate Corporation.[1]

The district court found that Beeler was injured on August 27, 1961, while he was engaged in loading the barge on navigable waters of the United States at Portland, Oregon. Just prior to the accident Beeler, and other longshoremen employed by Portland Stevedoring Company, were unloading trailer houses on top of half houses previously loaded on the deck of the barge. When it became necessary for Beeler and his fellow longshoremen to descend to the deck, the walking boss, an employee of the stevedoring company, moved an ordinary straight wooden ladder into position. He then stood on deck in front of the ladder ready to grab it in the event the ladder slipped or moved while it was in use.

When Brown, one of Beeler's fellow longshoremen, reached the third or fourth rung from the bottom of the ladder, Beeler mounted the ladder and started to descend. As Brown reached the deck, the walking boss, believing that Brown would stand by or would hold the ladder, walked away. Brown, having received no instruction of this kind, walked away. Brown, having received no instruction of this kind, failed to hold or guard the bottom of the ladder. The ladder slipped and Beeler fell to the deck sustaining serious injuries for which he now seeks recovery.

The court further found that where a ladder is to be used for a short period of time, it is the cus-

[1] It was stipulated that Foss Launch and Tug Company had no responsibility to the libellant and that the case was to proceed against Alaska Aggregate Corporation alone.

tom and practice for longshoremen to have one of their group hold the ladder rather than lash it to the deck or to another portion of the ship or cargo. The ladder itself was not defective. Further, it was found that had the ladder been held properly, it would have been safe. The proximate cause of the injury, the court found, was the negligent acts of Beeler's fellow workers in the use of a seaworthy appliance. It was the court's opinion that this ". . . was not a case in which the negligent acts which created the unsafe condition terminated; here the negligent acts of libelant's two fellow employees, the walking boss and Brown, caused the unsafe condition. . . ." simultaneously with the accident and injury.

These findings and expressions by the trial court indicate that it fully understood the legal principles were properly applied under the facts as found by the court.

Liability on the ground of unseaworthiness does not attach if the injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury. It does attach if the negligent act has terminated and an appliance has been left in an unsafe condition.[2]

The ladder did not fall because of the negligent way in which the walking boss or Brown, who preceded Beeler down the ladder, held or guarded the ladder at the moment of the accident. Neither of them were holding or guarding the ladder at that moment nor were they then in any other way using that equipment. Their negligence consisted in failing to act prior to the accident by stepping forward

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[2] *Billeci* v. *United States*, 298 F.2d 703, 706. See, also, *Rawson* v. *Calmar S. S. Corp.*, 9 Cir., 304 F.2d 202, 205.

to hold or watch the ladder. Instead, they walked away. Their negligence had come to rest before the ladder fell and was thus an antecedent condition causing the ladder to become unseaworthy.

Reversed and remanded to determine damages.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

GEORGE BEELER,	)	
Appellant,	)	
vs.	)	
ALASKA AGGREGATE CORPORATION, a corporation,	)	*No.* 19,188
Appellee.	)	
FOSS LAUNCH AND TUG COMPANY, a corporation,	)	
Respondent.	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court to determine damages.